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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioner,

v.

THARON RAWSON, Individually and as Guardian Ad Litem for SETH RAWSON and CINDY RAWSON; BERNIECE JOHNSON, Individually and as Guardian Ad Litem for MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON, and JOHN RUSSEL JOHNSON; LAURA DUNBAR, as Guardian Ad Litem for RICKINA ROSSITER and GLEN ROSSITER, JR.; and MARY WOOD, as Guardian Ad Litem for LESLIE D. WOOD, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Idaho

REPLY BRIEF FOR PETITIONER

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1. Portions of plaintiffs' brief can be read to suggest that regardless of the limited contractual authority stated in Article IX of the collective bargaining agreement the union *in fact* went further and performed inspections of the Sunshine Mine.[1] Based on that premise, plaintiffs

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[1] Although plaintiffs' brief from time to time lapses into phrases like "the Union undertook to perform inspections" (Resp. Br. at 5; *see also id.* at 1, 2, 19), the only passage in which that brief has any *description* of what the union in fact did is the following (Resp. Br. at 4-5, emphasis added):

[Footnote continued]

argue that the following state law tort rule can be applied to the union here: a person who makes inspections and who fails to conduct those inspections "in accordance with recognized standards" (Pet. App. 29a) may be liable in a state law tort action for hazards that a competent inspector would have discovered. Resp. Br. 12-19, 22. The short answer in this case is that the undisputed facts make it clear that the union never in fact performed inspections of the mine.

In our opening brief, we described in some detail Article IX of the collective bargaining agreement, which defined the union's role with respect to inspections of the Sunshine Mine. Pet. Br. at 4-5. That article did not provide the union any authority to conduct inspections of the mine. Rather, the article permitted the union to designate a rank-and-file union member to "accompany" the state mine inspector on state inspections of the mine and to designate a member to "accompany" the company

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[1] [Continued]

The Union has not denied nor does it deny in the present brief of Petitioner that it was not *involved* in safety inspections. The Union in fact concedes:

> A union member of the committee was permitted to accompany the state mine inspector on any state inspection made of the property. The union was also permitted to designate a representative to accompany the company's safety engineer once each month on a tour of the section of the mine . . . . The Union appointed three rank and file members . . . to serve on the joint safety committee . . . (Pet. Br. p. 5).
>
> . . . A union representative regularly accompanied the state mine inspector when he came to the mine to make the inspections that were mandated by Idaho law. One of the union representatives also accompanied the company safety engineer each month on a tour of a section of the mine that the safety engineer designated. The safety committee met regularly . . . to discuss what had occurred on these tours and to offer suggestions about safety concerns. (Pet. Br. p. 5).

safety engineer once each month on "a tour of a section of the mine" (J.A. 22). And the union had no right to conduct inspections of the mine without the company's agreement.[2]

Not surprisingly, the undisputed record evidence shows that the union's role in practice was precisely that provided for in Article IX. The union did appoint a rank-and-file member to accompany state or company mine inspectors: the state or company inspectors actually conducted the inspections; the union representative did not. The primary function in fact performed by the union representative in connection with these inspections was to serve as a conduit for safety-related complaints by employees in the portions of the mine being inspected (J.A. 36-37, 103-04). There is no record evidence that the union had any other office—or played any other role—with respect to these inspections; in particular, there is no evidence that the union itself ever performed an inspection of the mine.[3]

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[2] For example, Article IX did not provide for a union representative to accompany the federal inspector on the periodic federal inspections of the mine, and the company did not permit any union member to do so (J.A. 96).

[3] In this regard, we emphasize that neither in their brief to this Court nor previously have plaintiffs relied on, or attempted to support, the Idaho Supreme Court's assertion, in the opinion rendered after this Court's decision in *Electrical Workers v. Hechler*, 481 U.S. 851 (1987), that the union had "conceded" that the union "undertook to inspect" or "did actively undertake the subject inspection duties." (Pet. App. 5a-6a; *see* Pet. Br. at 11). As one of the dissenting justices pointed out, the union made no such concession (Pet. App. 10a; Pet. Br. at 11-12).

And, in their brief to this Court, plaintiffs cite no record evidence that the union ever performed an inspection of the mine. The few citations to the record in plaintiffs' brief are entirely consistent with the union's role as described in what plaintiffs deem to be "conced[ed]" by the union, *supra*, note 1. At various points in their brief, plaintiffs cite two passages of deposition tsetimony in this regard.

One passage is the testimony of Merlin Hoffman, a former safety engineer for Sunshine Mine (*id.* 212-216). Hoffman testified that at

2. Plaintiffs' brief states that "[t]he 'source' of the Union's duty is the *conduct* of the undertaking involving safety inspections." Resp. Br. at 11 (emphasis in original). As we have just shown, the union "conduct" involved here is nothing other than the union's administration of the safety article of the collective bargaining agreement, and the union's efforts to monitor, and attempt to influence, the *employer's* activities regarding safety. And, as we showed in part I of our opening brief, this union conduct is at the core of its function as exclusive bargaining representative and is governed exclusively by federal law.

Without denying the premises of our analysis in this regard, plaintiffs argue that to find federal preemption

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the Joint Safety Committee meetings the union representatives "usually . . . would have a list of items that they would like to have looked at or corrected or taken care of . . ." and that the items that the union observed and called to his attention commonly consisted of "primers, powder, ladders, possibly a defective piece of equipment, something of this sort" (*id.* 213). When asked how frequently he had made inspections, Hoffman responded: "I was down ever[y] day. But with . . . the union once a month" (*id.* 215). He also testified that the union representatives "at times [would] ask me on my daily rounds to stop and look at a specific item . . . to see what they thought were recommendations on whether it was a maintenance problem or a safety problem" (*id.* 216).

The other passage of testimony that plaintiffs cite is the deposition of Lavern Melton, the president of the local union (*id.* 95-99). Melton described the union's participation in inspection activities as "go[ing] on walk-around inspections with the state people" (*id.* 97). He described the union safety representatives' role as to be available to employees who "had any concern for safety," to listen to those concerns and convey them, if appropriate, to the federal or state mine inspectors (*id.* 95, 98). Later in the same deposition Melton testified that "[t]he function of the Safety Committee was to convey employees' concerns to the company" (*id.* 104).

Accordingly, neither passage cited by the plaintiffs supports the proposition that the union itself was performing inspections of the mine, as opposed to accompanying state and company inspectors and passing on to the inspectors, and to management, the safety-related complaints of employees.

in this case would have the effect of granting unions an unlimited immunity from state regulation, and that such an immunity would be too great an intrusion upon the interests of the states to be allowed (Resp. Br. at 27):

> Virtually everything a Union does is arguably done within its representational capacity. To adopt the Union's position would effectively extend immunity to the Union for any and all wrongful conduct unless it can be shown that under the duty of fair representation the Union acted in an arbitrary and discriminatory fashion.

The Idaho Supreme Court similarly suggested that the union's argument would require the preemption of state law "if a member of a union was struck by a motor vehicle owned by the union and operated by one of its officials during the course of his employment for the union" (Pet. App. 114a). As we now show, both the plaintiffs and the Idaho Supreme Court misunderstood the labor preemption doctrine and its limits.

In *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 297 (1971), this Court emphasized that the labor preemption doctrine is "purposefully administered" so that it does not displace "particular rule[s] of law" that are "so structured and administered that in virtually all instances it is safe to assume" that those rules "will not disserve the interests promoted by the federal labor statutes." The limits of the federal preemption rule, in other words, are inherent in the rationale for that rule. We set forth that rationale in our opening brief and do not repeat it here. *See* Pet. Br. 17-25.

Suffice it to say at this point that the process of collective bargaining established by the National Labor Relations Act requires that a union, as exclusive bargaining representative, be accorded a "wide range of reasonableness," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), in setting and pursuing priorities regarding how to confine through collective bargaining the other-

wise unfettered prerogatives of management, and regarding what contractual rules will be sought to govern the employer's conduct. *See* Pet. Br. 21-22. In particular, federal law requires that a union must be acccorded wide latitude in determining how most effectively to influence the employer's conduct in the respects desired by members of the bargaining unit. State law may not impose duties that are different from or in addition to the duties imposed by federal law in this regard, because such state law duties would narrow this "wide range of reasonableness." *Id.* at 22-23; *cf. Teamsters Union v. Oliver*, 358 U.S. 283, 296 (1959).

If state tort law imposed liability on a union for failing to negotiate for certain contract provisions, for failing to devote more resources to the prosecution of a particular grievance or arbitration, for failing to use particular methods or strategies to enforce an employer's obligations, for failing to achieve a particular result, or for not doing what someone might consider a good enough job at any of these representational tasks, that form of state regulation would strike at the vitals of the federal scheme. This Court has recognized as much and has determined that such representational activity is governed exclusively by federal law in order to assure that the careful balances struck by the federal labor policy are respected. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 194-195 (1967) (processing grievances); *Teamsters Union v. Morton*, 377 U.S. 252, 258-260 (1964) (choosing a lawful method to exert pressure on employer); *cf. Humphrey v. Moore*, 375 U.S. 335, 349-350 (1964) (administering contractual seniority provisions); *Ford Motor Co. v. Huffman*, 345 U.S. at 338 (negotiating for particular contract provisions). By the same token, it would impermissibly narrow the range of discretion accorded unions by federal law, if state tort law were permitted to regulate the union's choice as to how to implement Article IX of the collective bargaining agreement in this case.

While federal policies thus govern a union's exercise of its role as exclusive representative *in dealing with the employer* on behalf of the members of the bargaining unit, federal law has no similar special application to a myriad of other union activities. For example, the federal labor policy provides no particularized insight into the rules on licensing or maintenance of a union's car, or into the building codes that apply to a union's offices. Thus, there is no reason why the states would be prevented from applying to unions the same rules of conduct that apply to everyone else in the operation of motor vehicles or in the maintenance of property. With respect to such state law rules of conduct in the normal run of cases there is no substantial risk of conflict with federal policies. The "wide range of reasonableness" accorded unions by federal law was not meant to apply to conduct like the operation of motor vehicles.

Simply put, federal law has established the limits of regulation of the unique function performed by unions in our system of labor relations: the role of exclusive representative of employees *in dealing with their employer* with the end in view of *regulating the employer's conduct*. As to that function, inconsistent or additional state regulation must be preempted if the policies of federal law are to be effectuated. Congress has defined "[a] union's rights and duties as the exclusive bargaining agent in carrying out its representational functions . . .; Congress has 'occupied the field and closed it to state regulation.'" *Condon v. Steelworkers Local 2944*, 683 F.2d 590, 595 (1st Cir. 1982), *quoting from Teamsters Union v. Morton*, 377 U.S. at 261. The argument we make goes no further. Certainly that argument does not imply that unions have some general immunity from state regulation in areas where federal law has not occupied the field.[4]

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[4] Believing that heirs of employees cannot recover under federal law on either a breach of contract or duty of fair representation

3. Plaintiffs readily concede that the application of state tort law in a case such as this would regulate and affect the manner in which unions carry out their representational functions. Indeed, plaintiffs argue that states have a legitimate interest—in fact a "compelling . . . interest[]" (Resp. Br. 9)—in regulating and affecting such union conduct. Thus, for example, plaintiffs assert that Idaho has an interest in: fostering competition among unions as to which union would offer employees of the mine the best representation with respect to safety (Resp. Br. 23-24); "encourag[ing] the improvement of the services a Union provides to its members and permit[ting] the state to manage its workplace related resources" (*id.* 24); and permitting states "to marshall the resources available to them and to exercise control through state laws which seek to compel reasonable performance levels [from unions]" (*id.*).

These "state interests" all rest on the premise that the state has a legitimate concern with the manner in which unions perform their federally created representational functions. But, as we have already shown, federal law leaves no room for states to pursue such interests. It is not open for the states to assert an interest in how unions compete with each other or perform their represen-

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theory, plaintiffs attempt to make a virtue of necessity by arguing that their lack of "standing" under federal law requires that they be accorded a remedy under state law. Resp. Br. at 27-31. We are hard pressed to understand plaintiffs' belief that they lack standing to pursue a federal fair representation claim. *See Vaca v. Sipes*, 386 U.S. at 174. But in any event, in thus reframing the argument in terms of the identity of the *claimants*, plaintiffs once again disregard the basis for federal preemption in this case. The performance of a union's representational functions, and the "wide range of reasonableness" that federal law accords to unions would be no less affected, and the federal policy would be no less frustrated, if the representative were subject to damages payable to the employees' heirs than if suit were brought by the employee himself.

tational functions.[6] And plaintiffs' acknowledgment that application of the Idaho tort law in this case would affect union representation in the ways just described further illustrates why that rule must be preempted by federal law.

4. Plaintiffs argue that to allow Idaho tort law to govern the union's safety activities would be equivalent to the application of state "minimum employment standards," which generally are not preempted by the National Labor Relations Act under *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 751-758 (1985). *See* Resp. Br. at 22-23. The complete answer to this argument is that a rule that directly regulates the conduct of a union in fulfilling its responsibility as exclusive bargaining representative is not a "minimum employment standard" of the type that this Court found not preempted in *Metropolitan Life*. In that case the Court defined state minimum employment standards as follows:

> Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes

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[5] Even if these state interests were legitimate and indeed "compelling state interests," federal preemption would be appropriate here. This Court has repeatedly held that a "compelling state interest" is immaterial to preemption analysis when the conflict between federal and state law is substantive.

> Where, as here, the issue is one of an asserted substantive conflict with a federal enactment, then "[t]he relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that the federal law must prevail." [*Brown v. Hotel Employees*, 468 U.S. 491, 503 (1984), *quoting from Free v. Bland*, 369 U.S. 663, 666 (1962).]

See also, e.g., Felder v. Casey, 487 U.S. 131, 137-138 (1988); *Fidelity Federal Savings & Loan v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 526 n.22 (1981); *cf. City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638-639 (1973).

> that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act. Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of their interests collectively. . . . Nor do these laws even inadvertently affect these interests implicated in the NLRA. Rather, they are minimum standards "independent of the collective-bargaining process [that] devolve on [employees] as individual workers, not as members of a collective organization." [471 U.S. at 755, *quoting from Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981).]

The Court concluded that state minimum employment standards do not conflict with the NLRA because the NLRA is "concerned primarily with establishing an equitable *process* for determining terms and conditions of employment," 471 U.S. at 753 (emphasis added), while minimum employment standards only set *substantive terms* for wages, benefits, or working conditions that an employer must provide, and are "unrelated in any way to the *processes* of bargaining or self-organization," *id.* at 756 (emphasis added).

Application of Idaho tort law in this case would be wholly incompatible with the rationale of the *Metropolitan Life* decision. Idaho tort law does not set any substantive terms that employers must provide; instead, Idaho law would apply directly and exclusively to the "processes of bargaining [and] self-organization," by imposing special duties on the union to police the employer's maintenance of a safe workplace. The tort rule in question would not apply in unorganized workplaces at all, because in such a workplace there is no union to police any employer activities. In short, for the very reasons that application of the Idaho tort law to the union conduct here would interfere with the union's exercise of its representational functions, *see supra* at 4-7, the minimum standards concept of *Metropolitan Life* does not apply here.

5. In the final analysis, plaintiffs do not directly dispute any of the *premises* of our argument for preemption. Plaintiffs do not dispute that the duty of fair representation applies to the union's efforts to monitor the company's compliance with its safety obligations (*see* Pet. Br. at 18-19); that the duty has evolved as a careful balance between individual and collective interests within the bargaining unit (*see id.* at 21-22); that the addition of state law duties would upset that careful balance (*see id.* at 22-25); or that preemption is required whenever the application of state law would upset such a federal balance (*id.* at 25).[6]

Plaintiffs' real objection seems to be to the consequences of preemption, as to which plaintiffs have a very straightforward concern. If plaintiffs' state tort claim against

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[6] While plaintiffs cite and quote from several of this Court's preemption cases, none is inconsistent with the rule that preemption is required whenever the application of state law would upset a federal balance between competing interests. All of the cases plaintiffs cite, moreover, expressly rest upon the basic premises on which that rule rests, namely, that preemption is required if the state rule "conflicts with federal law or would frustrate the federal scheme." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985). *See also id.* at 751; *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *cf. Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981).

Plaintiffs quote a passage from the *Silkwood* opinion that "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." Resp. Br. at 20, *quoting from* 464 U.S. at 251. In *Silkwood* the conduct at issue was "illegal" because it violated federal regulations governing the handling of radioactive materials, *id.* at 248. In the instant case the quoted sentence from *Silkwood* begs the question: the union's conduct in regard to safety inspections could only be denominated "illegal" if state negligence law is applied; if the federal duty of fair representation supplies the exclusive standard by which the union's conduct may be judged, what the union did falls within the "wide range of reasonableness" that federal law affords unions. *See* Pet. Br. at 23-27.

the union is preempted, plaintiffs will be left with their recoveries from the employer under the Idaho workers' compensation scheme, and their recoveries from certain third-party manufacturers in a separate tort action. *See House v. Mine Safety Appliances Co.*, 573 F.2d 609 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978). And plaintiffs regard these recoveries as inadequate. That, we submit, is not a basis for failing to follow the logic of the preemption doctrine. It is the State of Idaho that has determined that the only recourse against the employer—the entity responsible for the safety of the mine—is under the state workers' compensation scheme, and it is the state that has set the levels of compensation under that scheme. If the recoveries under the Idaho workers' compensation scheme are inadequate, the answer is to amend that Idaho law, not to override the governing principles of federal labor law.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the decision and judgment of the Supreme Court of Idaho should be reversed.

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